



OFFICE OF CHIEF COUNSEL FOR ADVOCACY

U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

ORIGINAL

EX PARTE OR LATE FILED

September 17, 1998

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

RECEIVED

SEP 17 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

RE: Ex Parte Filing, Subscriber List Information,
CC Docket No. 96-115

Dear Ms. Salas:

The Office of Advocacy, U.S. Small Business Administration ("Advocacy") respectfully requests that the Federal Communications Commission ("FCC" or "Commission") adopt rules that define a reasonable price for subscriber list information ("SLI") pursuant to Section 222(e) of the Communications Act of 1934, as amended. 47 U.S.C. § 222(e).

The Office of Advocacy was established by Congress in 1976 by Pub. L. No. 94-305 (codified as amended at 15 U.S.C. §§ 634 a-g, 637) to represent the views and interests of small business within the federal government. Its statutory duties include serving as a focal point for concerns regarding the government's policies as they affect small business, developing proposals for changes in federal agencies' policies and communicating these proposals to the agencies. 15 U.S.C. § 634c(1)-(4).¹

Advocacy has met recently with the Association of Directory Publishers ("ADP"), representing independent directory publishers, and has consulted with several small and rural local exchange carrier trade associations to seek an equitable resolution to Advocacy's concerns about ADP's proposal for a specific rate benchmark.² These concerns were expressed to the Commission in a previous filing. See Ex parte Letter from S. Jenell Trigg, Assistant Chief Counsel for Telecommunications, Office of Advocacy, SBA, to Magalie Roman Salas, Secretary, FCC 2 (July 15, 1998).

It is Advocacy's intent to balance the mandates of the statute with marketplace realities, as well as identify the burdens and benefits incurred by the two conflicting classes of small entities directly involved in this proceeding, small directory publishers and small

¹ Advocacy also has a statutory duty to monitor and report on the FCC's compliance with the Regulatory Flexibility Act of 1980 ("RFA"), Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. § 601 et seq.), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

² Advocacy has discussed this proceeding with the National Rural Telecommunications Association, the National Telephone Cooperative Association, the Organization for the Protection and Advancement of Small Telephone Companies, and the Independent Telephone & Telecommunications Alliance.

No. of Copies rec'd
List A B C D E

082

telecommunications carriers. It is imperative that this proceeding move to the final rule stage as soon as possible to eliminate market-entry barriers for independent directory publishers. See 47 U.S.C. § 257. Advocacy feels that the following proposal, developed jointly by ADP and Advocacy, meets that balance. It also meets the requirements of the Regulatory Flexibility Act, as amended. 5 U.S.C. § 601 et seq.

Specifically, we urge the Commission to adopt pricing rules for SLI which:

- make clear that "market-based" prices are unreasonable and that only cost-based prices satisfy section 222(e);
- establish a four cent benchmark rate for SLI and SLI updates;
- provide for an exemption from the benchmark for rural telecommunications carriers; and
- permit waivers for local exchange carriers ("LECs") or competitive exchange carriers ("CLECs") that can prove their costs exceed the four cent benchmark.

A. Market-Based Pricing Is Impermissible

Many LECs are offering SLI prices that are not cost-based. For example, BellSouth's tariffed prices for the same listing information vary depending on how the competing directory publisher intends to use the listing. Under BellSouth's tariff, the price per basic listing for use in a single directory is ¢0.04. See Louisiana Tariff at A.38.2.3. The price is ¢0.12 for the same listing for use in multiple directories and ¢0.18 for use in CD ROM directories. See id. Daily updates are \$1.50 per listing and new connect reports are \$2.00. See id. Ameritech also charges different prices depending on the type of directory in which the listing will be used. Use in a single publication is ¢0.13 per listing while use in multiple publications is ¢0.25 per listing. See Ameritech Listing Agreement with Midwest Directories, Inc. (Sept. 24, 1997). Ameritech's daily charges are \$1.75 for updates and \$1.25 for new connects. See id.

The independent directory publisher's use of the listing does not affect the LECs' costs; the cost to BellSouth and Ameritech is the same per listing regardless of whether it is used in a single directory, multiple directories, or a CD ROM directory. Hence, the difference in rates cannot be justified on the basis of cost. Rather, these rates represent "market-based" pricing, i.e., prices that are based on what the market will bear as opposed to the incremental cost of providing the service plus a reasonable profit. Indeed, BellSouth expressly testified that its SLI pricing is market-based. See Testimony of BellSouth Witness Juneau before the Florida PSC (Jan. 13, 1997) at 129. Because SLI represents an "essential facility" which independent directory publishers cannot duplicate, the LECs are able to use market-based SLI pricing to extract monopoly profits. See U.S. Copyright Office, Report on Legal Protection for Databases (August 1997) (concluding that SLI is a "prototypical" example of data which is available from only one source). Hence, the Commission must regulate SLI rates, as described below, to ensure that they are nondiscriminatory and reasonable.

B. Four Cent Benchmark

Section 222(e) requires that Local Exchange Carriers ("LEC") and Competitive Local Exchange Carriers ("CLEC") provide SLI to directory publishers at "nondiscriminatory and reasonable" rates. Advocacy notes that it is bedrock law that a reasonable price has been interpreted to mean a cost-based price. *See, e.g., ALLTEL Corp. v. FCC*, 838 F.2d 551, 557 (D.C. Cir. 1988) ("[A] basic principle used to ensure that rates are 'just and reasonable' is that rates are determined on the basis of cost.") Four cents should serve as an appropriate benchmark rate for SLI and SLI updates. That price is being offered by BellSouth -- a company which presumably engages in efficient pricing -- for basic listings in several markets and has been approved by several state Public Utility Commissions ("PUC"). While there is evidence that a four cent price may in fact not be cost-based, it certainly is capable of serving as a reasonable benchmark. Directory publishers who believe that any LEC or CLEC's four cent (or lower) price is in fact unreasonable would retain the right to file Section 208 complaints.

C. Exemption From The Four Cent Benchmark

It has been Advocacy's major concern that the Commission's imposition of a specific rate benchmark would unduly burden small rural telecommunications carriers that may have costs in excess of the four cent benchmark. Consequently, an exemption from the benchmark would be appropriate, particularly in the absence of reliable cost data, for rural telecommunications as defined in Section 3 (37) of the Communications Act. 47 U.S.C. § 153(37).³ Such exemptions are typically granted to rural telecommunications carriers. *See, e.g.,* 47 U.S.C. § 251(f)(1) (exempting rural telephone companies from Section 251(c)'s obligation to interconnect, to provide access to network elements on an unbundled basis, and to resell telecommunications services unless the State PUC finds that such interconnection is not "unduly economically burdensome [and] is technically feasible"). The Commission certainly reserves the right to revisit this exemption in the future given a change in circumstances. Directory publishers who believe that rural telecommunications carriers are pricing SLI in excess of cost would, of course, maintain the right to file complaints under Section 208 of the Act.

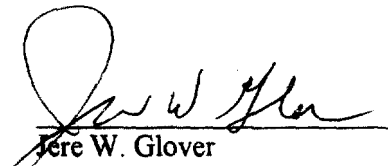
D. Waivers For Permission To Exceed The Four Cent Benchmark

Advocacy also believes that it is appropriate that any LEC or CLEC that believes the four cent benchmark is too low to cover costs for that carrier should be permitted to seek a waiver and thereby exceed the benchmark. In that circumstance, the burden of proof would be on the LEC or CLEC to provide a full accounting of its costs. As evidence of such a showing, a carrier would have to demonstrate that it does not provide SLI to any other entity for any purpose at a price less than the price it seeks to charge for SLI.

³ By using this statutory definition, the advance approval of the SBA Administrator for an alternative small business size standard in a rulemaking is not necessary. 15 U.S.C. § 632(a)(2)(C).

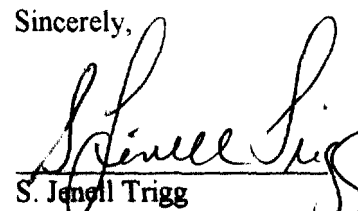
Magalie Roman Salas
September 17, 1998
Page Four

In summary, Advocacy supports the FCC's adoption of (1) pricing rules for SLI that are "cost-based;" (2) a four cent benchmark for SLI and SLI updates; (3) an exemption from the four cent benchmark for small rural telephone companies as statutorily defined pursuant to the Telecommunications Act of 1996; and (4) a waiver process to exceed the four cent benchmark for all carriers not subject to the exemption. Thank you for your consideration of this proposal. Please call S. Jenell Trigg at 202-205-6950 if you have any questions or comments regarding this filing.



Jere W. Glover
Chief Counsel for Advocacy

Sincerely,



S. Jenell Trigg
Assistant Chief Counsel for
Telecommunications

Office of Advocacy
U.S. Small Business Administration
409 Third Street, SW Suite 7800
Washington, DC 20416
202-205-6533

cc: Kathryn C. Brown, FCC
James D. Schlichting, FCC
Jane E. Jackson, FCC
Carol E. Matthey, FCC
Dorothy T. Attwood, FCC
Jay M. Atkinson, FCC
Douglas Galbi, FCC
William A. Kehoe, III, FCC
David A. Konuch, FCC
Tonya Rutherford, FCC
Katherine Schroder, FCC
Philip Verveer, Willkie Farr & Gallagher (Counsel to ADP)
Michael F. Finn, Willkie Farr & Gallagher (Counsel to ADP)